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No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the temporary presence of a migratory bird on an isolated, intrastate wetland can support, under the Commerce Clause, the assertion of federal jurisdiction over private property.

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BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for both petitioner and respondents have consented to the filing of this brief in letters that have been lodged with the Clerk.

process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has argued as *amicus curiae* in several recent cases that the commerce power does not extend to federal regulation of wild animals. *See, e.g., Gibbs* v. *Babbitt*, No. 99-1218, 2000 WL 726073 (4th Cir. June 6, 2000); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* in many cases in which WLF is also involved, including *Gibbs* and *National Ass'n of Home Builders*.

STATEMENT

1. The Clean Water Act prohibits the discharge of any "pollutant," including fill materials, into "navigable waters" without a permit from the United States Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The "navigable waters" subject to the Corps' jurisdiction are defined in the Act only as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Corps has promulgated regulations defining the "waters of the United States" as, *inter alia*, "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and "[a]ll other waters such as *intrastate* lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . . ." 33 C.F.R. § 328(a)(1), (3) (1995) (emphasis added).

In a 1986 preamble to its regulations, the Corps observed that the Environmental Protection Agency had indicated that the "waters of the United States . . . also include" intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," or "[w]hich are or would be used as habitat by other migratory birds which cross state lines . . . ." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). "For lack of a better term, perhaps, this language in the preamble has been described as the 'migratory bird rule.'" Pet. App. 15a. The question in this case is whether the Corps' interpretation of the Clean Water Act is constitutionally sufficient to support the exercise of federal jurisdiction.

2. Petitioner Solid Waste Agency of Northern Cook County (SWANCC) purchased a 533-acre parcel of land in Illinois to use as a landfill. Part of the tract had previously been used for strip mining, which left a "labyrinth of trenches and other depressions" on the land. Pet. App. 2a. These man-made basins, some of which fill with rainwater only seasonally, "range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Ibid.* Because petitioner's operations would "require the filling of approximately 17.6 acres of semi-aquatic property" (Pet. App. 3a), petitioner applied to the Corps for a fill permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a).

Although the Corps initially determined that the property did not encompass "waters of the United States," and thus did not fall within the Corps' regulatory jurisdiction, the Corps changed position when it was informed that migratory birds had been observed on the site. "This new information made all the difference to the Corps, because of the so-called migratory bird rule." Pet. App. 4a. The Corps determined that the presence of migratory birds rendered the ponds and puddles on petitioner's property "waters of the United States" subject to the Corps' jurisdiction under the Clean Water Act.

3. After concluding that it had the power to regulate petitioner's property, the Corps denied petitioner's request for a Section 404 permit. This lawsuit, in which petitioner challenged (*inter alia*) the constitutionality of the migratory bird rule, then ensued.

a. The district court granted summary judgment for the Corps. According to the court, "the cumulative degradation of intrastate waters could have a substantial effect on interstate commercial interests relating to [migratory] birds." Pet. App. 20a. As a result, the court concluded that "a federal agency may assert jurisdiction over intrastate waters even if the destruction of those particular waters will not have a substantial effect on interstate commerce and there is no evidence that migratory birds support human commercial activity there." *Ibid.*

b. The court of appeals affirmed. The court said that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce." Pet. App. 7a. Even though "[t]he effect may not be observable as each isolated pond used by the birds for feeding, nesting and breeding is filled," the court concluded that "the aggregate effect is clear, and that is all the Commerce Clause requires." *Ibid.*

SUMMARY OF ARGUMENT

The Corps of Engineers' "migratory bird rule" exceeds the authority conferred on the federal government by the Commerce Clause, and the Corps' assertion of regulatory jurisdiction over petitioner's property should, therefore, be invalidated as unconstitutional.[2]

1. In *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), this Court made clear that the Commerce Clause includes judicially enforceable outer limits. Within those limits, the Court's cases have recognized three broad categories of activity that Congress can regulate: (a) the channels of interstate commerce, (b) the instrumentalities of interstate commerce, and (c) activities that substantially affect interstate commerce.

a. The migratory bird rule cannot be sustained as a regulation of the channels of interstate commerce. Although certain *navigable* waters may constitute such channels, the isolated ponds and ditches on petitioner's property do not constitute navigable waters under even the most lenient of this Court's Commerce Clause precedents. *See, e.g., Kaiser Aetna* v. *United States*, 444

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[2] The constitutionality of the migratory bird rule need be resolved only if this Court makes the antecedent determination that the Corps' construction of the Clean Water Act is a permissible interpretation of the statute. *See* note 3, *infra*.

U.S. 164, 171-74 (1979) (citing, *inter alia*, *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940)).

b. Nor can the migratory bird rule be sustained as a regulation of things in interstate commerce. Although interstate commercial transactions involving animals, once captured, may be subject to regulation under the commerce power, animals in their feral state are the property of no one and, therefore, do not constitute articles or instrumentalities of commerce.

c. As the court of appeals recognized, the migratory bird rule can be sustained only if it regulates activity that has a substantial effect on interstate commerce. Pet. App. 6a. In making that determination, the Court must consider (i) whether the regulation reaches economic activity, (ii) whether the link between the regulated activity and interstate commerce is direct or attenuated, (iii) whether the regulation includes an express jurisdictional element, and (iv) whether Congress has made findings regarding the regulated activity's effect on commerce. *Morrison*, 120 S. Ct. at 1749-51. As in *Lopez* and *Morrison*, each of those factors indicates that the migratory bird rule exceeds the commerce power.

i. The actual or potential presence of migratory birds on petitioner's property does not involve commercial transactions or economic activity. As a result, the court of appeals erred in "aggregating" the cumulative and speculative effects on commerce of the destruction of migratory bird habitats nationwide. Rather, the Corps must establish that the activity on the land to be regulated would have a substantial effect on commerce, which it has not done (and cannot do).

ii. The connection between the activity the Corps seeks to regulate and interstate commerce is exceedingly attenuated. The court impermissibly "pile[d] inference upon inference" in concluding that, because some people cross state lines to hunt or observe migratory birds, the filling of 17.6 acres on petitioner's property could have a substantial effect on interstate commerce. *See Lopez*, 514 U.S. at 567. The court of appeals' reasoning has no logical stopping point. If accepted, the federal government could regulate all of the Nation's lands and waters, as well as every bird, beast and fish, under the guise of the commerce power.

iii. The migratory bird rule contains no jurisdictional element to ensure that the requisite nexus with interstate commerce is present. Although migratory birds might (or might not) cross state lines, the self-propelled flight of birds cannot provide the necessary nexus because the birds themselves are not in interstate commerce. A contrary conclusion would mean that the federal government could regulate every pond and puddle that might be visited by migratory birds. *Cf. Jones* v. *United States*, 120 S. Ct. 1904, 1911 (2000).

iv. Congress has made no findings regarding the impact, if any, that the extension of Clean Water Act jurisdiction to intrastate waters that may temporarily be visited by migratory birds would have on interstate commerce. Indeed, because the migratory bird rule is an administrative interpretation rather than a statute, the deference this Court ordinarily gives Congress regarding the scope of the commerce power is not warranted in this case. The constitutionality of the Corps' interpretation of its own jurisdiction under the Act is a question

for this Court, not the political branches. *Morrison*, 120 S. Ct. at 1753 & n.7.

2. The migratory bird rule offends basic notions of federalism. *See Morrison*, 120 S. Ct. at 1754 ("The Constitution requires a distinction between what is truly national and what is truly local"). The activity that the Corps seeks to regulate has historically been the province of the States.

a. The regulation of land use activities has traditionally been entrusted to the States and their political subdivisions. *See, e.g., Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The Corps' migratory bird rule would usurp the police power over such activities.

b. Moreover, the regulation of wild animals is a traditional area of state concern. *Geer* v. *Connecticut*, 161 U.S. 519 (1896). Although this Court has said that there is also a national interest in protecting migratory bird habitats, it has not done so in the context of the Commerce Clause. Rather, the Court has said that this interest may support the acquisition and regulation of land by the federal government pursuant to the *property* power (*North Dakota* v. *United States*, 460 U.S. 300 (1983)), and the enactment, pursuant to the *treaty* power, of federal statutes to enforce international treaties to protect migratory bird populations (*Missouri* v. *Holland*, 252 U.S. 416 (1920)). Those cases, which construed other powers conferred on the government under the Constitution, did *not* hold that the *commerce* power encompasses wild animal regulation. On the contrary, the migratory bird rule exceeds the enumerated powers of the federal government.

ARGUMENT

While Congress's powers under the Commerce Clause are indisputably expansive, even defenders of the Corps of Engineers' so-called migratory bird rule acknowledge that the assertion of federal jurisdiction over every puddle or birdbath on which migratory waterfowl may temporarily alight "tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir.), *cert. denied sub nom. Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995). *Amici* submit that the migratory bird rule clearly exceeds the federal authority to regulate interstate commerce conferred by the Constitution. As a result, the Corps' assertion, in sole reliance on that rule, of regulatory jurisdiction over petitioner's property should be invalidated as unconstitutional.

1. It is undisputed that the Commerce Clause issue in this case must be resolved under the framework articulated by this Court in *United States* v. *Lopez*, 514 U.S. 549 (1995), and reiterated last Term in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000). As those cases make clear, the congressional power to regulate interstate commerce necessarily includes "judicially enforceable outer limits." *Lopez*, 514 U.S. at 566; *see also Morrison*, 120 S. Ct. at 1748 ("even under [this Court's] modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds"). Enforcement of those limits is necessary to ensure that our federal government acts only within the sphere of enumerated powers conferred on it by the Constitution.

The Court explained in *Lopez* that precedent establishes "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. at 558.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted); *see also Morrison*, 120 S. Ct. at 1749. The migratory bird rule at issue in this case is not a permissible exercise of federal authority under any of those categories.

a. The migratory bird rule does not regulate the "channels of interstate commerce." To be sure, some *navigable* waters of the United States are, literally, channels of commerce among the States, and are therefore subject to federal regulation. *See, e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). And Congress may regulate commercial activity relating to some animals (fish, for example) that occupy such waters. *Cf. Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977). The Corps' migratory bird rule, however, cannot be sustained on this rationale.

In a series of decisions, this Court has "define[d] the scope of Congress' regulatory authority under the Inter-

state Commerce Clause" over navigable waters. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979) (citing *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); *South Carolina* v. *Georgia*, 93 U.S. 4 (1876); *The Montello*, 87 U.S. (20 Wall.) 430 (1874); and *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871)). Under even the most lenient of those definitions, however, the isolated ponds and ditches on petitioner's property cannot constitute "navigable waters" within this Court's Commerce Clause jurisprudence. *See Appalachian Power*, 311 U.S. at 426-27. They certainly do not comprise part of the "highway for commerce between ports and places in different States" (*Ex parte Boyer*, 109 U.S. 629, 632 (1884)) that justifies the exercise of federal power. *See* Gov't C.A. Br. 23 n.13 ("Paragraph (a)(3) waters . . . are, by definition, neither part of a tributary system to navigable or interstate waters nor 'adjacent' to such waters or their tributaries").

The Court made clear in *Kaiser Aetna* that, if a regulation does not affect "navigable waters" as defined by the Court's precedents, then "traditional Commerce Clause analysis" should be employed in evaluating whether a particular regulation is within the commerce power. *See* 444 U.S. at 173-74. In particular, in cases such as this one that do not involve navigable waters, the inquiry becomes whether the regulated activity substantially affects commerce (*i.e.*, the third mode of analysis identified in *Lopez*). *Ibid.*[3]

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[3] The Court need not reach the "substantial effects" test in this case. Under the plain language of the Clean Water Act, the Corps' jurisdiction is limited to "navigable waters," defined only as "the waters of the United States." In construing the scope of this statu-

[Footnote continued on next page]

b. The migratory bird rule is not a regulation of the "instrumentalities of commerce." That is because *ferae naturae*, such as free-ranging migratory birds, are the property of no one. *See Seacoast Products*, 431 U.S. at 284 ("[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."). As a result, at least as long as the birds continue to migrate freely, they do not amount to articles of commerce and cannot be the subject of commercial transactions.

[Footnote continued from previous page]
tory jurisdiction, this Court has previously declined to "address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1985). Answering that question in the negative would mean that the Corps' migratory bird rule, at least as applied in this case, is not authorized by the statute. *See United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) ("as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least . . . closely related to navigable or interstate waters"). Such a construction would not only comport with common sense, but also would render consideration of the Commerce Clause issue unnecessary. *Cf. Jones* v. *United States*, 120 S. Ct. 1904, 1911-12 (2000) (construing federal arson statute narrowly to avoid Commerce Clause difficulties posed by broader interpretation urged by the government). *Amici* address the constitutional issue in the event the Court disagrees with petitioner's submission that the statutory reach of the Clean Water Act does not extend to isolated ponds unconnected to any navigable or interstate waterways.

Once reduced to possession through seizure or capture, wild animals could well be "things in interstate commerce" the sale or transportation of which may be subject to regulation under the commerce power. *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). This rationale explains, for example, the Court's observation (quoted, out of context, by the Solicitor General) that the "'assumption that the national commerce power does not reach migratory wildlife is clearly flawed.'" Opp. to Pet. for Cert. 18 (quoting *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979)). In the quoted case, the Court was considering the Secretary of the Interior's authority, pursuant to the Bald Eagle Protection Act, "to bar *commercial transactions* in covered bird parts." *Allard*, 444 U.S. at 63 (emphasis added). But that rationale has no applicability to the Corps' efforts to regulate private property simply because it may be *visited* by migratory birds, because no commercial transactions are involved.

c. Thus, as the Solicitor General appears to acknowledge (*see* Opp. to Pet. for Cert. 17), the migratory bird rule can be upheld, if at all, only upon a finding that it constitutes a regulation of activities that, although wholly intrastate, have a substantial effect on interstate commerce. *See* Pet. App. 6a ("the migratory bird rule" can "only [be] sustained as an exercise of the third variety of regulatory power"). But the Corps' attempt to extend its jurisdiction to petitioner's property cannot be upheld on this ground either.

As the Court explained last Term, *Lopez* "provides the proper framework" for analyzing whether a federal law properly regulates activity that substantially affects interstate commerce. *Morrison*, 120 S. Ct. at 1749. That framework sets forth four separate areas of inquiry:

(i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the link between the regulated activity and interstate commerce is direct or attenuated; (iii) whether the regulation includes an express jurisdictional element; and (iv) whether Congress has made findings regarding the regulated activity's effect on interstate commerce. *See id.* at 1749-51. As in *Lopez* and *Morrison*, each of those factors indicates that the migratory bird rule at issue in this case exceeds the authority granted to the federal government under the Commerce Clause.

i. As discussed above, the migratory bird rule is not aimed at commercial or economic activity. As a result, the linchpin of the court of appeals' Commerce Clause analysis cannot bear the weight the court sought to put on it. The court below said that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." Pet. App. 6a (citing, *inter alia*, *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). The court thus implicitly recognized that the Corps' application of the migratory bird rule in this particular case could *not* be justified as substantially affecting commerce, but had to be "aggregated" with other such regulation in order to satisfy the substantial effects test.

The court of appeals failed to acknowledge, however, that "in every case where [this Court has] sustained federal regulation under *Wickard*'s aggregation principle, *the regulated activity was of an apparent commercial character*." *Morrison*, 120 S. Ct. at 1750 n.4 (emphasis added); *see Lopez*, 514 U.S. at 559-60 (prerequisite to applying aggregation analysis is determination that federal law regulates "intrastate *economic activity*") (emphasis added). Indeed, the Court recently stressed that "thus far in our Nation's history [the Court's] cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751 (emphasis added).

Thus, in *Lopez*, the Court found that since federal regulation of gun possession is not "an essential part of a larger regulation of *economic* activity," the law at issue could not be sustained under precedents, such as *Wickard*, "upholding regulation of [intrastate] activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561 (emphases added). Similarly, in *Morrison*, the aggregation principle was inapplicable because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 120 S. Ct. at 1751. So, too, here.

The court of appeals did not even undertake to inquire, much less make a determination, whether the Corps' migratory bird rule is either directed at economic activity or part of a larger scheme of economic regulation. And plainly it is not. Like the gun possession statute at issue in *Lopez* and civil remedy provision of the Violence Against Women Act invalidated in *Morrison*, the focus of the Corps' regulation–the actual or potential presence, however fleeting, of uncaptured migratory birds on private property–is not economic or commercial activity. *See Gibbs*, 2000 WL 726073, at *24-25 (Luttig, J., dissenting). Neither the presence of the wild

animals, nor regulation of aquatic property on which they might land, can be considered "in any sense of the phrase, economic activity." *Morrison*, 120 S. Ct. at 1751.

In the absence of commercial transactions or economic activity, the "aggregation" analysis exemplified by *Wickard* is simply inapplicable. Rather, in circumstances such as these, "[t]he point of *Lopez* was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause power." *Cargill*, 516 U.S. at 955 (Thomas, J., dissenting from denial of certiorari). Because there is absolutely no indication that the effect on migratory bird populations of petitioner's proposed use of its land would itself affect interstate commerce, the Corps' attempt to regulate that activity exceeds the scope of the federal commerce power.

ii. The court of appeals' contrary conclusion, that the filling of isolated ponds could have a substantial effect on commerce, gives new meaning to the term "attenuated." From the premise that many Americans spend money engaging in bird-related activities such as hunting and birdwatching, and that some of them cross state lines to do so, the court below deduced that the filling of man-made depressions on a few acres of petitioner's property could have an effect on interstate commerce. Pet. App. 7a. This is precisely the type of reasoning condemned by the Court in *Lopez*: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the

Commerce Clause to a general police power of the sort retained by the States." 514 U.S. at 567.

As in *Lopez* and *Morrison*, the Corps' attenuated chain of reasoning to reach an impact on interstate commerce would leave nothing that the federal government could *not* regulate. For example, tourists travel to New England each fall to view the turning leaves; under the Corps' theory, the federal government could therefore regulate every tree. Similarly, people regularly travel to shoot, fish, trap, observe and photograph game throughout the Nation; under the Corps' theory, the federal government could regulate not only the animals themselves, but also whatever natural (or unnatural) environments, irrespective of private ownership, the creatures great and small call home.

Under the Corps' view of the commerce power, therefore, each parcel of land, every ditch and puddle, the blades of grass and the soughing wind–verily, all aspects of nature that might draw the interest of some part of the citizenry–would be subject to control by the federal government. As Judge Sentelle has rightly observed, theories such as those put forth by the Corps in this case have "no logical stopping point." *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (dissenting opinion), *cert. denied*, 524 U.S. 937 (1998). The federal government would be able to exert a police power over the Nation's lands and waters, and the birds, beasts and fishes that inhabit them, no less sweeping than the generalized power to combat crime asserted in *Lopez* and *Morrison*. But, as the Court said in rebuffing the government's insistence in those cases that the commerce power has virtually no limits, "[w]e *always* have rejected readings of the Commerce

Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 120 S. Ct. at 1754 (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)). The Court should do so here as well.

iii. The migratory bird rule contains no "jurisdictional element" to ensure that the requisite nexus with interstate commerce is present. *See Lopez*, 514 U.S. at 561-62. Although the Corps concluded that the aquatic areas of petitioner's property "'are or could be used as habitat by migratory birds which cross state lines'" (Pet. App. 4a), the nexus requirement can be met only by the interstate transportation of the instrumentalities or things of commerce. *See, e.g., United States* v. *Bass*, 404 U.S. 336, 347-49 (1971).

Since wild animals are not themselves in interstate commerce, their crossing of state boundaries (even if established) cannot provide the nexus to commerce that the Court's cases require. *See Cargill*, 516 U.S. at 955 (Thomas, J., dissenting from denial of certiorari) ("the self-propelled flight of birds across state lines" does not create "a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds"). It is a truism that birds fly. But the mere fact that their path of flight may cross a state line, without constituting or impacting commercial activity, does not trigger the commerce power.

A contrary conclusion would mean that the federal government could regulate literally every body of standing water, both permanent and transitory, that might be visited, however fleetingly, by migratory birds. *Cf. Jones*, 120 S. Ct. at 1911 ("Were we to adopt the Government's expansive interpretation of [the arson statute], hardly a building in the land would fall outside the federal statute's domain"); *Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Acceptance of the Corps' expansive view of its own jurisdiction would eviscerate the very doctrine of enumerated powers by authorizing the federal government to regulate all manner of wholly intrastate property. Congress could thereby subject landowners to one-size-fits-all federal rules, rather than the varied state schemes that have traditionally governed the use of real property. *Cf. Lopez*, 514 U.S. at 580-83 (Kennedy, J., concurring).

The court of appeals attempted to avoid this obvious conclusion by asserting that the Corps "must first make a factual determination that a particular body of water provides a habitat for migratory birds." Pet. App. 8a. That construction is inconsistent with the plain terms of the migratory bird rule, which purports to give the Corps "*carte blanche* authority to regulate every property that migratory birds use or could use as habitat." *Cargill*, 516 U.S. at 955 (Thomas, J., dissenting from denial of certiorari); *see* 51 Fed. Reg. at 41,217 (asserting federal jurisdiction over waters that "are *or would be* used as habitat by birds") (emphasis added). In any event, the definition of "habitat" is so broad as to add no limitation whatsoever to the assertion of federal jurisdiction over waters that may be used, even temporarily, by any of the billions of migratory birds that make use of the Nation's flyways. *See, e.g., Rueth* v. *EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland

affects interstate commerce is whether migratory birds *use* the wetland") (emphasis added). The "use" of an isolated body of water by a migratory bird is simply an insufficient nexus to interstate commerce to support the exercise of federal authority.

iv. As in *Lopez*, "to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." 514 U.S. at 563. In particular, Congress has *never* sought to explain how the extension of the Corps' Section 404 permitting authority over isolated waters that are or could be used by migratory birds substantially affects interstate commerce.

Indeed, because the "migratory bird rule" is an administrative interpretation of the Clean Water Act, there has been *no* "legislative judgment" regarding the effect on commerce, if any, of the activity in question. Unlike the statutes at issue in *Lopez* and *Morrison*, the decision to extend federal authority to intrastate activities was not made by the People's elected representatives, but rather by bureaucrats. Thus, while "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds" (*Morrison*, 120 S. Ct. at 1748), this Court need not declare any act of Congress invalid if it determines that the Corps has adopted an overly aggressive interpretation of its jurisdiction under the Clean Water Act. Rather, the Court need only decide that the Corps, in the preamble to its interpretive

regulations, went too far in defining the scope of its own regulatory jurisdiction.

The Solicitor General puts much weight on the Conference Committee's statement that "'[t]he conferees fully intend that the term 'navigable waters' [in the CWA] be given the broadest possible constitutional interpretation . . . .'" Opp. to Pet. for Cert. 15 (quoting S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972)). But aside from the obvious fact that "legislative intention, without more, is not legislation" (*Train* v. *City of New York*, 420 U.S. 35, 45 (1975)), the conferees' observation begs the question of whether the Corps' interpretation of the term in the migratory bird rule is constitutional. *That* is ultimately a question for this Court, not a congressional committee or an administrative agency, to decide. *See, e.g., Morrison*, 120 S. Ct. at 1753 n.7 ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text").

2. In addition to failing the Commerce Clause analysis articulated in *Lopez* and *Morrison*, the Corps' migratory bird rule offends basic notions of federalism. As the Court explained last Term, "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 566, 568. The activities that the Corps seeks to regulate–land use and wildlife–have traditionally been matters of state concern.

a. The regulation of local land use activities has long been the province of the States and their political subdivisions. *See, e.g., Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994); *Village of Belle Terre* v. *Boraas*, 416

U.S. 1, 13 (1974); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). In fact, the Court has specifically recognized that "a State's power to regulate the use of water . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power." *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). The Corps is attempting to usurp that "police power" through the implementation of its migratory bird rule.

The court of appeals attempted to dismiss the concern that the Corps was intruding on matters of state sovereignty, but its reasoning was entirely circular: "[B]ecause the regulation of migratory bird habitat is a permissible exercise of Congress' authority, the Supremacy Clause . . . squarely supports the legitimacy of giving precedence to federal law in this area." Pet. App. 9a. As discussed above, the regulation of isolated, intrastate waters solely because they might be visited by migratory birds is *not* a "permissible exercise" of federal authority. At the very least, the question is, indisputably, a close one. *See Leslie Salt*, 55 F.3d at 1396. In these circumstances, deference to traditional state autonomy is appropriate. *Cf. New York* v. *United States*, 505 U.S. 144, 156-57 (1992).

b. States have also long asserted authority over the wild birds, animals and fishes within their borders. As the Court has explained, this is an incidence of sovereignty that has been exercised since at least Roman times. *Geer* v. *Connecticut*, 161 U.S. 519, 522-28 (1896); *see also Seacoast Products*, 431 U.S. at 287-88 (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). This authority is exercised in a variety of ways,

including the establishment of hunting seasons, the various schemes of fishing and other licenses required, limitations on the size and number of animals that can be caught, and the like. *See, e.g., Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978).

Although the Court has held that the States cannot enforce regulation that discriminates against interstate commerce in game *after* it has been reduced to possession, and therefore becomes an article of commerce (*Hughes*, 441 U.S. 322), the Court has never cast doubt on the traditional authority of the States to regulate the activities of people in relation to animals in the wild. Nor has the Court ever suggested that the federal government has the authority to (for example) limit the deer-hunting season in Virginia or require permits for fishing in Alaska's intrastate waters.

The court of appeals said that the contention that federal regulation of migratory birds intrudes on an area of traditional state sovereignty "is refuted by the numerous international treaties and conventions designed to protect migratory birds [citations], as well as the case law recognizing the 'national interest of very nearly the first magnitude' in protecting such birds, *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983); *see also Missouri* v. *Holland*, 252 U.S. 416 (1920)." Pet. App. 8a. The court missed the point.

In commenting on the national interest in migratory birds, the Court in *North Dakota* v. *United States* was construing a statute that authorized the federal government to acquire, by purchase, land that might be used as bird habitats. *See* 460 U.S. at 309-10. The power of eminent domain is undoubtedly an attribute of national sovereignty, and the federal government, if it so

chooses, may exercise that power for any lawful purpose, including migratory bird preservation. *See id.* at 310 ("the United States unquestionably has the power to acquire wetlands for waterfowl production areas, by purchase or condemnation, without state consent"). And, of course, once the government has acquired property it may thereafter exercise its plenary jurisdiction over it. *See Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

But the federal government's regulation, pursuant to the property power, of wild animals on its *own* lands says nothing about whether the federal government can regulate, pursuant to the commerce power, man-made ponds on *private* property based only on the actual or potential presence of migratory birds. Certainly, neither *North Dakota* v. *United States* nor any other decision of this Court has concluded, under the "substantial effects" test, that the Commerce Clause authorizes such federal regulation.

The Court's decision in *Missouri* v. *Holland*, which sustained the constitutionality of the Migratory Bird Treaty Act, likewise did not suggest, much less hold, that the Commerce Clause authorizes the federal government to regulate wild animals. In fact, the Solicitor General had argued in that case that "[a] migratory bird law of this kind is sustained, apart from treaty, . . . by the power to regulate commerce between the States." 252 U.S. at 423 (summarizing argument for the United States). The Court implicitly rejected that argument, holding instead that the statute could be sustained, if at all, only as an exercise of the *treaty* power. *Id.* at 433-34. That power is not implicated in this case.

The Court's decision in *Missouri* v. *Holland* makes clear that the regulation of migratory birds is *not* within Congress' enumerated powers, including the commerce power. *See id.* at 433 ("there may be matters . . . that an act of Congress could not deal with but that a treaty followed by such an act could"). In other words, *Missouri* v. *Holland* "thus views the treaty power as a delegation of authority to federal treaty-makers independent of the delegations embodied in the Constitution's enumeration of powers entrusted to Congress." Tribe, *American Constitutional Law* 646 (4th ed. 2000). It is a necessary corollary of the Court's holding that the subject of the treaty and its implementing statute (*i.e.*, migratory birds) is "exclusively within the ambit of the states with respect to domestic legislation, but not with respect to international agreements–and laws enacted by Congress pursuant thereto." *Ibid.*

Thus, neither *Missouri* v. *Holland*, nor the several treaties cited by the court of appeals, lends support to the Corps' argument that the regulation of migratory birds is within the commerce power. On the contrary, the reasoning of *Missouri* v. *Holland* dictates the conclusion that where, as here, such a treaty has *not* been enacted, the regulation of wild animals remains a matter of state concern that is outside the enumerated powers conferred on Congress. And because "[e]very law enacted by Congress *must* be based on one or more of its powers enumerated in the Constitution" (*Morrison*, 120 S. Ct. at 1748 (emphasis added)), the migratory bird rule cannot be sustained as a valid exercise of federal authority. *See Lopez*, 514 U.S. at 567-68.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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